

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ROBERT LEE WALTERS II,
Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ROBERT LEE WALTERS,

Respondent-Appellant.

UNPUBLISHED
September 27, 2005

No. 261063
Lapeer Circuit Court
Family Division
LC No. 04-009703-NA

In the Matter of ROBERT LEE WALTERS II,
Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

TOINA MARIE HANSON,

Respondent-Appellant.

No. 261064
Lapeer Circuit Court
Family Division
LC No. 04-009703-NA

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right the trial court order terminating their parental rights to the minor child under MCL 712A.19b(3)(a)(ii), (c)(i), (g) and (j). We affirm.

The trial court did not clearly err in determining that the statutory grounds for termination of parental rights were established by clear and convincing evidence. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). The evidence showed that respondents were

ordered to comply with their parent agency agreements and pay support for the minor child at the July 23, 2004 initial disposition, but failed to make any progress by the time of the February 11, 2005 termination hearing.

Respondents received assistance from protective services for many months before this proceeding in an effort to remedy the child's environmental neglect. During the nine-month course of this proceeding, respondents failed to support the minor child and failed to pursue reunification by making any effort to achieve the goals set out in their parent agency agreements. Respondents relocated to Escanaba without notifying the agency, failed to maintain stable housing and employment, failed to attend counseling or address their substance abuse issues, and did not provide support for the minor child. Their visits with him were suspended because of positive drug screens, and the evidence showed that respondent father continued to use drugs as late as January 2005. Respondents failed to support the minor child and made no effort toward reunification, thereby deserting him for more than ninety-one days. They failed to rectify the conditions of adjudication or to become able to provide proper care or custody for the minor child. Given the amount of time the agency had worked with respondents, and their minimal effort, there was no reasonable expectation that they would be able to provide proper care for the minor child within a reasonable time. The child would return to the same environment if returned to respondents and would suffer the harm of neglect.

Respondent mother also argues on appeal that her right to representation by counsel was violated when the trial court failed to appoint counsel at the preliminary hearing and that the statements she made while testifying without benefit of counsel or caution by the trial court tainted the remainder of this proceeding. Michigan statute and case law provide that a respondent has the right to an attorney in a child protective proceeding at the first hearing at which she appears, and case law provides that the right to counsel in a child protective proceeding is an indirect constitutional right. MCL 712A.17c(5); MCR 3.915(B)(1); *Reist v Bay Circuit Judge*, 396 Mich 326, 349; 241 NW2d 55 (1976). Respondent did not raise this issue in the trial court and, therefore, did not preserve it for review. Unpreserved constitutional issues are reviewed for plain error that affects substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Respondent mother requested counsel at the preliminary hearing and reiterated that request during the course of the hearing. The evidence showed that respondent mother believed the protective service worker's testimony was incorrect in part, desired to give her own version of events, and did not know how to cross-examine the protective services worker. The trial court indicated that counsel was not immediately available, and respondent mother elected to testify even though she heard the trial court caution respondent father against testifying without the benefit of counsel. Respondent's right to present effective testimony, and to cross-examine the protective services worker were substantially affected by the trial court's failure to appoint counsel.

However, failure to appoint counsel at the preliminary hearing does not necessitate reversal. Respondent waived her right to counsel both by failing to claim error until the time of this appeal and by choosing to testify at the preliminary hearing even though counsel was not available. *In the Matter of Jones*, 137 Mich App 152, 155; 357 NW2d 840 (1984). Additionally, the purpose of the preliminary hearing was merely to determine whether the interests of the public or the child required further action, and jurisdiction or termination were not decided at

that point. *In the Matter of Kantola*, 139 Mich App 23, 26; 361 NW2d 20 (1984). Any allegedly incriminating statements made by respondent when she testified without benefit of counsel were not heard by the judge who presided over subsequent proceedings and were affirmed when respondent was represented by counsel and admitted the allegations in the petition at the adjudication three weeks later. Respondent's substantial rights were not affected by lack of counsel at the preliminary hearing.

We affirm.

/s/ Richard A. Bandstra

/s/ Janet T. Neff

/s/ Pat M. Donofrio